

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7038

77-7038

To Be Argued By
DAVID FOX, ESQ.

UNITED STATES COURT OF APPEALS

For The
SECOND CIRCUIT

MILLICENT LINDEN,

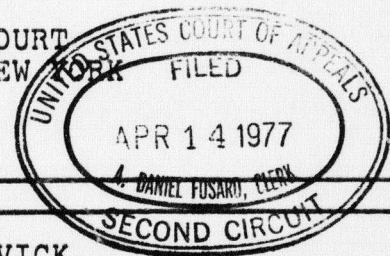
Plaintiff-Appellant

-against-

NATHAN NOVICK,

Defendant-Appellee.

APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF OF APPELLEE NATHAN NOVICK

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

The sole issue presented for review is whether the complaint of plaintiff-appellant presents any cause of action sufficient to invoke federal jurisdiction. The District Court, Hon. Morris E. Lasher, answered the issue in the negative and dismissed the complaint.

STATEMENT OF THE CASE

Plaintiff originally brought suit in the Civil Court of the City of New York against one, Dr. Novick, a chiropractor, for alleged malpractice as a result of treatment administered to her on September 13, 1973. This case was defended by the insurance carrier of the doctor and a verdict was rendered in favor of the defendant.

That verdict was appealed to the Appellate Term and affirmed. Permission to appeal to the Appellate Division of the Supreme Court, State of New York, was denied.

Subsequently, a second suit was brought in the Supreme Court, New York County, by the same plaintiff against the same defendant arising out of the same incident. This second suit, unlike the first, alleged willful, intentional tortious conduct and not negligence. Under such circumstances, the insurance carrier refused to represent Dr. Novick, and so the law firm of Isaacson & Robustelli was retained for such purposes.

In defending Dr. Novick, a demand for a Bill of Particulars was served upon the plaintiff therein, to which there was no effective response. Subsequently, a demand for a further Bill of Particulars was served upon her, to which no effective response was received.

As a result, a motion to preclude was made. The case

was subsequently transferred by Judge Postel in the Supreme Court, State of New York to the Civil Court, City of New York, pursuant to Section 325-D of the CPLR.

On January 8, 1976, the case appeared in the Personal Appearance Calendar before Judge Weiss, who, upon motion, struck it off said calendar.

Motions by the plaintiff to restore it to the calendar were denied.

Subsequently, a motion for summary judgment was made by the defendant therein, and the case was dismissed by Judge Schackman of the Civil Court, City of New York. That decision was reported on October 27, 1976 in the New York Law Journal as affirmed by the Appellate Term (N.Y.L.J. page 8, column 2). As such, all avenues of motions and appeals were open to the plaintiff to pursue her remedies of which she could avail herself.

Plaintiff moved for permission to appeal to the Appellate Division. The motion was denied and the denial affirmed upon re-argument. Plaintiff thereupon attempted to appeal to the Court of Appeals of the State of New York but the Court would not entertain the motion.

Having exhausted all remedies and appeals in the State Courts, plaintiff has turned to the Federal Courts to prosecute the same action under another, and new, title.

The action by plaintiff MILLICENT LINDEN against NATHAN NOVICK, 76 Civ. 4404, Judge Lasker, resulted in a decision by the Court that there was no diversity of citizenship and that the complaint did not state a Federal cause of action. As such, the complaint was dismissed.

ARGUMENT

PLAINTIFF FAILS TO STATE A CAUSE OF ACTION SUFFICIENT TO INVOKE FEDERAL JURISDICTION.

(A) The complaint purports to state a claim under "the Constitutional provision protecting life and limb (for the pursuit of happiness) and under the Civil Rights Act.

The claim set forth in the complaint, however, namely, that the defendant did deliberately misalign plaintiff's pelvis is merely a repetition of the allegation made by plaintiff in her Supreme Court action.

Notwithstanding plaintiff's inability to frame any recognizable constitutional argument, the facts alleged, under any reading, at most state an action in tort. In essence plaintiff is seeking in the present action to have this Court review the decisions of the State Appellate Courts.

That this is plaintiff's intention is clearly set forth on Page 14 of her brief on appeal wherein she states "Plaintiff instituted action in the Federal Court in order to be heard on the full merits, as had been requested in the State

and City Courts and denied" (emphasis added).

Clearly it has been held that the principle known as comity provides that a Federal Court has no power to intervene in the internal procedures of the State Courts.

WALLACE v. KERN, 481 F. 2d 621.

It is also clear that the Federal District Court possesses no power to sit on appellate review of a State Court judgment.

ATLANTIC COAST LINE R. CO. v. BROTHERHOOD OF
LOCOMOTIVE ENGINEERS, 398 US 281

(B) Section 1983, Civil Rights Act, preserves constitutional rights from infringement only when committed "under color of State law".

It is not violated by acts of private citizens however willful or malicious such acts may be.

SPAMPINATO v. M. BREGER & CO., 270 F. 2d 46
PALERMO v. ROCKEFELLER, 323 F. Supp. 478

The requirement that action be taken "under color of State law" is indispensable to any suit under the Civil Rights Act.

STAMBLER v. DILLON, 302 F. Supp. 1250

There must be misuse of power acquired by virtue of State law and made possible because defendant is possessed with authority of such law.

MONTGOMERY v. WHITE, 320 F. Supp. 303

The fact that defendant herein is a chiropractor licensed by the State is not sufficient to invoke the provisions of the Civil Rights Act. The Court in WEYANDT v. MASONS STORER, INC., 279 F. Supp. 283, described as fallacious plaintiff's argument equating acting under license of the State with action under authority of State law. Similarly in JOYCE v. FERRAZZI, 323 F. 2d 931, it was held that a physician acting as a private practitioner acts as a private citizen and is not a member of a class exposed to liability under the Civil Rights Act. As defendant's alleged actions are indisputably those of a private practitioner, defendant is not a member of the class exposed to liability under the Act.

(C) The complaint specified that both plaintiff and defendant are residents of the State of New York. Accordingly there is no diversity jurisdiction.

CONCLUSION

It is clear that the complaint states no federal cause of action and diversity of jurisdiction does not exist.

The Order dismissing the complaint (and denying plaintiff's motion for default judgment) should be affirmed.

Respectfully submitted,

ISAACSON, ROBUSTELLI, FOX, FINE &
GRECO, P.C.

Attorneys for Defendant-Appellant
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DAVID FOX, Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

PHYLLIS M. SORRENTINO, being duly sworn, deposes and says:

I am not a party to this action; I am over eighteen (18) years of age; I reside at Brooklyn, New York.

On April 12th, 1977, I served two (2) copies of Brief of Appellee Nathan Novick upon Millicent Linden, Plaintiff-Appellant in the within action, at her address, 500 East 74th Street, New York, New York, by depositing true copies of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Phyllis M. Sorrentino
PHYLLIS M. SORRENTINO

Sworn to before me this
12th day of April, 1977

Samuel Graff
SAMUEL GRAFF
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1528600
Qualified in Queens County
Commission Expires March 22, 1979